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United States of America

In The

Supreme Court of the United States

Appeal from the United States Court of Appeals
for the Sixth Circuit

No. 291

FREEDMAN BROTHERS & CO., et al.,
Appellants
v.
ORLAND ELLIS, Trustee of the Detroit
Central Wholesale Grocery Company,
a Michigan Corporation, Bankrupt,
Appellee

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition by Freedman Brothers & Co., *et al.* for this Court's Writ of Certiorari to review a judgment of the Court of Appeals for the Sixth Circuit, rendered in this cause on April 13, 1951.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

The issues in this matter arose at the first meeting of creditors and the election of the trustee. Ninety-seven (97) creditors whose claims totalled $43,124.04 voted for Kenneth Pfister, who had been receiver, for trustee and eight (8) claims totalling $92,458.69 voted for Irving Boigon for trustee. The creditors voting for Pfister filed written objections to one of the claims voting for Boigon. This claim was the claim of Sam Phil in the amount of $86, 775.00 and the objections were that the claim had been paid; that there had been a failure of consideration; that the corporation was not authorized to make any payments other than represented by written instrument. The claim of Sam Phil was one in which Sam Phil had loaned the corporation a considerable sum of money and, according to the objections, this money had been repaid.

A cursory examination of the objections to the Sam Phil claim or of the claim itself by the Referee would have convinced him that the claim should not have been allowed to vote.

If the Sam Phil claim had not been allowed to vote, Pfister would have had the majority of claims in number and amount. The Referee summarily excluded consideration of the objections. He refused to even make a cursory examination of the objections or of the Phil claim.

In the midst of the voting for a trustee, the Referee took a recess and without notice to any of the attorneys involved

in the matter, called Mr. Pfister into his chambers with Mr. Field, who was associated with Mr. Pfister in the office of the Detroit Association of Credit Men, and asked Mr. Pfister whom was he going to employ as his attorneys. Mr. Pfister told the Referee that he was going to employ Frazer & Popkin, who had acted as his attorneys when he was the receiver, and the Referee then told him that in that case he could not appoint Mr. Pfister as trustee.

When the court convened again, the Referee appointed a third person, Mr. Orland Ellis, as trustee.

A review was taken to the District Court and the District Court held that no bias or prejudice could be imputed to the Referee. The court has jurisdiction in this matter because it arises out of and under the Chandler Act concerning bankruptcy.

JURISDICTION

The jurisdiction of this Court to review the question herein presented is vested under U. S. Code, Title 11, Chapter 2, Sec. 11. The judgment of the Court of Appeals was entered on April 13, 1951, will become final on September 1, 1951, upon denial of the petition for rehearing June 1, 1951. The time for filing this petition and brief in support thereof expires September 1, 1951.

QUESTIONS PRESENTED

Question 1

Where a claim is voted at the first meeting of creditors and written objections are filed thereto, can the Referee in Bankruptcy allow the claim to be voted without making a preliminary examination to determine at least whether the objections are honestly made and there is reasonable ground for their consideration?

Question 2

Where a Referee in Bankruptcy during the course of a First Meeting of Creditors and hearing on election of a trustee interviewed the Receiver, who was nominated trustee, in his chambers and advised the Receiver that he would not appoint him trustee because the Receiver indicated that he would employ Frazer and Popkin as his counsel, was such conduct prejudicial?

STATUTES INVOLVED

"Section 44. a. The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its board of directors or trustees or of other similar controlling bodies, shall, at the first meeting of creditors after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, appoint a trustee or three trustees of such estate. If the creditors do not appoint a trustee or if the trustee so appointed fails to qualify as herein provided, the court shall make the appointment." United States Code, Title 11, Chapt. 5 Sec. 72.

"Section 44. c. An attorney shall not be disqualified to act as attorney for a receiver or trus-

tee merely by reason of his representation of a general creditor." United States Code, Title 11, Chapt. 5, Sec. 72.

SPECIFICATION OF ERRORS TO BE URGED

1. The Court of Appeals erred in holding that the Referee in Bankruptcy could allow a claim to vote for trustee without reference to written objections filed to the claim and without making a preliminary examination to determine at least whether the objections to the claim were honestly made and whether there was reasonable ground for their consideration.

2. The Court of Appeals erred in holding that the Referee in Bankruptcy had the right and power to appoint or to designate to the proposed trustee the attorney who should act as the attorney for trustee and the Court of Appeals thought that the Referee in bankruptcy had the right to refuse to appoint a trustee unless that trustee promised to retain an attorney of the Referee's own choosing.

This decision is in conflict with the decisions of other Circuit Courts of Appeals on the same matter. An extensive examination of authorities leads us to believe that the question has not been, but should be, settled by this Court. The petitioner as an additional reason for this Court's issuance of a writ of Certiorari avers that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings by confirming the lower court's ruling, that an exercise of this Court's power of supervision in this particular instance is necessary.

FRAZER & POPKIN,
Attorneys for Appellants,
1826 National Bank Building,
Detroit 26, Michigan.

Dated: July 27, 1951.

SUPPORTING BRIEF FOR THE APPELLANTS

STATEMENT OF QUESTIONS INVOLVED

1. Where a claim is voted at the First Meeting of Creditors and written objections are filed thereto, can the Referee in Bankruptcy allow the claim to be voted without making a preliminary examination to determine at least whether objections are honestly made and there is reasonable ground for their consideration?

The lower courts answered "Yes."
Appellant contends it should be answered "No."

2. Where a Referee in Bankruptcy during the course of a First Meeting of Creditors and hearing on election of a trustee interviewed the Receiver, who was nominated trustee, in his chambers and advised the Receiver that he would not appoint him trustee because the Receiver indicated that he would employ Frazer and Popkin as his counsel, was such conduct prejudicial?

The lower courts answered "Yes."
Appellant contends it should be answered "No."

ARGUMENT

QUESTION 1

Where a claim is voted at the First Meeting of Creditors and written objections are filed thereto, can the Referee in Bankruptcy allow the claim to be voted without making a preliminary examination to determine at least whether objections are honestly made and there is reasonable ground for their consideration?

> "The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its board of directors or trustees or of other similar controlling bodies, shall, at the first meeting of creditors after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, appoint a trustee or three trustees of such estate. If the creditors do not appoint a trustee or if the trustee so appointed fails to qualify as herein provided, the court shall make the appointment" *Sec. 44(a) of the Bankruptcy Act.*

There are different methods of procedure when a claim is objected to. The Referee can either delay the election and go into the objections sufficiently to determine whether the claim should be voted or he can suspend the claims and go forward with the elections without them. The Referee's powers along this line have been amply set forth in the case of *Pan-American Match Company,* 242 Fed. 995.

In that case objections were made to certain claims and the Court said that it was discretionary with the Referee either to delay the election and go into obections sufficiently to determine whether the claims should be voted or to suspend the claims and go forward with the election without them.

In the instant case the Court allowed the claim to which objections had been filed to vote without going into the objections to determine whether the claim should be voted.

In *In re Jacob Malino,* 118 Fed. 368, the District Court reversed the Referee in an election of a trustee. The Referee refused to entertain objections to certain claims on the ground that the claimants were preferred creditors and not entitled to have their claims allowed until the preferences were surrendered.

> "The referee overruled the objections offering to consider them later and accepted the proofs of claims objected to as presented and a trustee was elected thereupon. The court said 'I think the proceedings were erroneous. The right of creditors to elect a trustee is a substantial one *(Henschel,* 114 Fed. 968), and it does not rest in the discretion of the referee to allow claims as voting bases when objections are made which are apparently genuine. While the selection of a trustee cannot be tied up indefinitely, by obstructive tactics which are obviously for the purpose of delay, in proper cases provisional allowances or disallowances may be made in order that a trustee may be expeditiously selected; nevertheless the proceedings should not be so summary as to exclude the consideration of all objections. Objecting creditors and the bankrupt are entitled to a hearing upon the objections for the purpose of determining at least whether they are honestly made and there is reasonable ground for their consideration. These facts being established, the claims should not be allowed for the purpose of voting.' "

As a matter of fact the Referee seemed to be in considerable haste to dispose of the matter during that afternoon and at no time did he make any attempt whatsoever to determine whether the Sam Phil claim was valid, pro-

visionally or otherwise, and the Referee insisted on going ahead, even in the face of the fact that the Bankrupt was not present and that the testimony of the bankrupt might determine the validity of the claim, as pointed out to the Referee (R. 2).

QUESTION 2

Where a Referee in Bankruptcy during the course of a First Meeting of Creditors and hearing on election of a trustee interviewed the Receiver, who was nominated trustee, in his chambers and advised the receiver that he would not appoint him trustee because the Receiver indicated that he would employ Frazer and Popkin as his counsel, was such conduct prejudicial?

It was apparent from the opening of the Court and throughout the record of the proceedings before the Referee that the Referee had a prejudicial attitude toward the nominee of the appellants. This was indicated by the Referee's undue haste in appointing a trustee of his own choosing and from the conversation in his chambers (R. 24-30).

The Referee himself admits that such a conversation took place (R. 28-29).

These facts were not disclosed until a hearing before the District Court on the review of the Referee's findings (R. 23-30). It indicates that the Referee did not desire to examine the claim of Sam Phil or go into the objections in the proper manner. It is further apparent that the Referee, upon learning that Mr. Pfister intended to employ Frazer & Popkin as his counsel, pre-judged the fact before a determination was to be made concerning the attorneys for the trustee. General Order No. 44 provides:

> 44.—Appointment of Attorneys
>
> "No attorney for a receiver, trustee or debtor in possession shall be appointed except upon the

> order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys. If satisfied that the attorney represents no interest adverse to the receiver, trustee, or the estate, in the matters upon which he is to be engaged, and that his employment would be to the best interests of the estate, the court may authorize his employment and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer. If without disclosure any attorney acting for a receiver or trustee or debtor in possession shall have represented any interest adverse to the receiver, trustee, creditors or stockholders in any matter upon which he is employed for such receiver, trustee, or debtor in possession, the court may deny the allowance of any fee to such attorney, or the reimbursement of his expenses, or both, and may also deny any allowance to the receiver or trustee if it shall appear that he failed to make diligent inquiry in to the connections of said attorney. * * *"

If the Court felt that the proposed attorneys for the proposed trustee were not proper persons to act in that capacity, he could have, upon presentation of petition by the trustee seeking leave to employ the attorneys, refuse to enter the order. However, as shown in the record (R. 10), the referee made no criticism of the attorneys for the receiver, who were stated to be the proposed attorneys for the proposed trustee, saying that he had no feeling in the

matter and did not intend to be in the position of having to direct the selection.

Sec. 44(c) of the *Bankruptcy Act;*
Collier on Bankruptcy (14th Ed.), Vol 2, Sec 44.23;
Kanter v. Robertson, 102 Fed. (2nd) 92.

Respectfully submitted,

FRAZER & POPKIN,
Attorneys for the Appellants.

UNITED STATES OF AMERICA

IN THE

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No. 291

FREEDMAN BROTHERS & CO., Et Al.,

Petitioners,

vs.

ORLAND ELLIS, Trustee of The Detroit Central Wholesale Grocery Company, a Michigan Corporation, Bankrupt,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

At the first meeting of creditors of the bankrupt, Detroit Central Wholesale Grocery Co., held March 1, 1950, the creditors' vote for trustee, allowing all claims to vote, resulted in a stalemate (3, 5, 8).

Petitioners, in effect, asked for time to introduce proof (9) on their unverified objections (4, 12, 13, 31) to the largest single claim (hereinafter called the Phil claim) (2, 6) which was verified (4). This offer was denied on the ground of interminable delay in hearing objections on the merits (9) and would not be in the best interests of the estate or the creditors (6, 9, 17).

The contending factions could reach no agreement (8) and the referee thereupon appointed Orland H. Ellis Trustee, a disinterested person (9).

The action was affirmed by the District Court on review (37) and by the Court of Appeals for the 6th Circuit (55, 56).

The primary purpose of a first meeting is to elect a trustee. In re McGill, 106 Fed. 57 (C.A. 6).

Rule 176, Bankruptcy Rules, Eastern District of Michigan:

> ". . . Objections to the allowance of a claim . . . if raising an issue of fact shall be under oath . . ."

Under the circumstances, the Phil claim was valid prima facie and entitled to vote. *Whitney* v. *Dresser,* 200 U.S. 532.

United States Code, Title 11, Chapter 5, Sec. 72.

Section 44. a: "If the creditors do not appoint a trustee . . . the court shall make the appointment." (see also in *re Knox,* 221 Fed. 36 (C.A. 6).

In view of the facts, herein, to appoint a disinterested person trustee who has, since his appointment proceeded with the diligent administration of the estate, is not "a plain and injurious error of law or abuse of discretion". In *re Rosenfeld - Goldman Co.,* 228 Fed., 921, 923.

To remove the trustee would cause needless expense to the estate. It is submitted that the issues herein present a factual question and that no abuse of discretion is shown.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ORLAND ELLIS, Respondent,
In pro per.